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Khoo Boon Chin v Alice Tan Ling Mei

B HIGH COURT (PENANG) — DIVORCE PETITION NO PA-33–336–09 OF 2018
AMARJEET SINGH JC
23 SEPTEMBER 2019

C *Family Law — Divorce — Petition — Whether respondent entitled to custody of both children — Whether matrimonial property subject to division — Whether respondent entitled to lump sum of maintenance*

D The petitioner, the husband of the respondent, petitioned for divorce of a marriage of 11 years and the custody of the two children of the marriage ('A' and 'B'). A, a girl aged 11 years and B, a boy aged four years. The parties accepted that the marriage had irretrievably broken down. They blamed each other for the break down. Both stated that the behaviour of each other was such
E that the petitioner or the respondent could not reasonably be expected to stay with the other. Evidence showed that the respondent was a highly strung person with a short temper that had erupted in bouts of violence which had been directed to the children, especially towards A. Apart from the above, the respondent also accused the petitioner of having an affair. The respondent
F sought for: (a) custody of both children or alternatively custody of B; (b) an order for the sale of the matrimonial properties and the proceeds to be divided equally between parties, including the property purchased in 2016; (c) the petitioner's mother's house (identified as the matrimonial home by the respondent) be sold and the proceeds divided under s 76 of the Law Reform
G (Marriage and Divorce) Act 1976 ('the LRA'); and (d) the petitioner pay a lump sum of RM30,000 as a clean break for maintenance.

Held, allowing the petition:

H (1) In considering the wishes of the children, the court found that the respondent was the cause of A's psychiatric condition and it was not safe for the child to be in the respondent's custody and there was no necessity to interview A given the circumstances. With regards to B, he was not of an age to express an independent opinion on what his wishes were. Given
I the prevailing circumstances of the case, the children should be placed under the custody, care and control of the petitioner. The evidence revealed that the respondent was a person who had pursued her own interest and career to the detriment of her children and it did not appear that she would change to accommodate the growing children's needs (see paras 8 & 11).

(2) The children are now in a stable environment of family life and school. It would be disruptive to separate them from one another as well as the family environment they are currently in. It would be risky and irresponsible to award her custody of the children, or even B, given that the respondent works late hours at an establishment where alcohol is available, her behaviour and temper. The proper order to make was to grant custody to the petitioner with access to the respondents on weekend to B only. Access to A was granted only if A consented (see paras 12–13).

(3) In light of the principles established in *Yap Yen Piow*, it was clear that the property acquired in 2016 could fall within the ambit of sub-s (1) of s 76 of the LRA if the allegations therein were proven by the respondent. However, there was no evidence that the respondent had contributed towards the deposit and/or purchase price of the said property where 90 percent was made up of a loan taken. There was no evidence as to who had taken the loan and the repayment of the loan. The respondent could not even identify the property and its location. In furtherance of the principles established in *Yap Yen Piow*, it was clear that the property was acquired before marriage and the respondent had not done any substantial improvement to property. Payment of maintenance fees, electricity and water bills and other utilities did not fall within the ambit of 'substantial improvement'. The property was therefore not subject to division at all (see paras 18–19).

(4) The respondent had taken a lackadaisical attitude in this case and has not shown any seriousness in pursuing this case. The maintenance demands were an afterthought. The offer by the petitioner to pay the respondent a sum of RM30,000, interest free by way of instalments is a fair and reasonable offer (see paras 21–22).

[Bahasa Malaysia summary

Pempetisyen, suami kepada responden, memfailkan petisyen untuk penceraian perkahwinan selama 11 tahun dan hak penjagaan kedua-dua anak daripada perkahwinan ('A' dan 'B'). A, seorang budak perempuan berumur 11 tahun dan B, seorang budak lelaki berumur 4 tahun. Pihak-pihak mengakui bahawa perkahwinan telah berpecah-belah dengan tidak dapat lagi dipulihkan. Mereka menyalahkan sesama sendiri untuk perkahwinan yang tidak dapat diselamatkan. Kedua-dua menyatakan bahawa tingkah laku masing-masing adalah sehingga pempetisyen atau responden tidak boleh lagi dengan munasabah dijangka untuk tinggal bersama. Keterangan menunjukkan bahawa responden adalah seorang yang bersifat cepat emosi dan panas baran telah menjadi punca serangan keganasan yang telah ditujukan kepada anak-anak, lebih-lebih lagi kepada A. Selain daripada itu, responden juga menuduh pempetisyen mempunyai hubungan sulit. Responden memohon: (a) hak penjagaan kedua-dua anak atau secara alternatifnya hak penjagaan

untuk B; (b) satu perintah untuk penjualan hartanah perkahwinan dan hasil-hasilnya untuk dibahagikan secara sama rata antara kedua-dua pihak, termasuk hartanah yang dibeli pada 2016; (c) rumah milik ibu pempetisyen (dikenal pasti sebagai rumah perkahwinan oleh responden) dijual dan hasilnya dibahagikan di bawah s 76 Akta Pembaharuan Undang-Undang (Perkahwinan dan Penceraian) 1976 ('Akta'); dan (d) pempetisyen membayar RM30,000 sekaligus sebagai nafkah.

Diputuskan, membenarkan petisyen:

(1) Dalam mempertimbangkan keinginan anak-anak, mahkamah mendapati bahawa responden adalah punca masalah psikiatri A dan ia adalah tidak selamat untuk anak tersebut berada dalam jagaan responden dan tiada keperluan untuk menemu duga A berdasarkan keadaan. Berkenaan dengan B, beliau tidak cukup umur untuk menyatakan pendapat bebas berkenaan keinginan beliau. Memandangkan keadaan semasa kes, anak-anak sepatutnya diletakkan di bawah jagaan, penjagaan dan kawalan pempetisyen. Keterangan menunjukkan bahawa responden adalah seorang yang telah meneruskan minatnya sendiri dan kerjaya sehingga menjejaskan anak-anaknya dan ia tidak kelihatan bahawa dia akan berubah untuk menampung keperluan anak-anak yang semakin meningkat (lihat perenggan 8 & 11).

(2) Anak-anak kini di dalam persekitaran kehidupan keluarga dan sekolah yang stabil. Ia akan menjadi gangguan untuk memisahkan mereka dari satu sama lain dan juga persekitaran keluarga mereka kini. Ia akan menjadi berisiko dan tidak bertanggungjawab untuk memberikan hak penjagaan anak-anak, ataupun B, memandangkan responden bekerja sehingga lewat di kelab di mana alkohol boleh didapati, tingkah laku dan panas baran beliau. Perintah yang wajar dibuat adalah untuk memberikan hak penjagaan kepada pempetisyen dengan akses kepada responden pada hari minggu kepada B sahaja. Akses kepada A diberikan hanya jika A memberikan kebenaran (lihat perenggan 12–13).

(3) Berkaitan dengan prinsip yang telah ditentukan di dalam kes *Yap Yen Piow*, ia adalah jelas bahawa hartanah yang diperolehi pada 2016 boleh jatuh di bawah sub-s (1) s 76 Akta tersebut jika pertuduhan-pertuduhan tersebut dibuktikan oleh responden. Walau bagaimanapun, tiada keterangan bahawa responden telah menyumbang kepada deposit dan/atau harga belian hartanah tersebut di mana 90 peratus terdiri daripada pinjaman yang diambil. Tiada keterangan berkenaan siapa yang telah mengambil pinjaman dan pembayaran balik pinjaman. Responden juga tidak boleh mengenal pasti hartanah dan lokasinya. Mengambil bahagian kepada prinsip yang telah ditentukan di dalam *Yap Yen Piow*, ia adalah jelas bahawa hartanah telah diperoleh sebelum perkahwinan dan responden tidak membuat apa-apa 'penambahbaikan yang ketara'

kepada hartanah. Pembayaran yuran penyelenggaran, elektrik dan bil-bil air dan utiliti-utiliti lain tidak jatuh di bawah lingkungan 'penambahbaikan yang ketara'. Hartanah oleh itu tidak tertakluk kepada pembahagian langsung (lihat perenggan 18–19).

(4) Responden telah mengambil sikap tidak endah di dalam kes ini dan tidak menunjukkan apa-apa keseriusan dalam meneruskan kes ini. Nafkah yang diminta adalah sesuatu yang difikirkan kemudian. Tawaran oleh pempetisyen untuk membayar responden jumlah RM30,000, tanpa faedah secara ansuran adalah tawaran adil dan wajar (lihat perenggan 21–22).]

Cases referred to

J v C [1970] AC 668, HL (refd)
K (minors), Re [1977] Fam 179, CA (Eng) (refd)
KO (an infant), Re [1990] 1 MLJ 494, HC (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234; [1977] 1 LNS 138, FC (refd)
Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals [2016] 1 MLJ 585; [2016] 2 CLJ 505, FC (refd)
Yap Yen Piow v Hee Wee Eng [2017] 1 MLJ 17; [2016] 1 LNS 1060, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 76, 76(1), (3), (5), 88(2), (4)

Danny Navarendran (Danny CN, Sivaguru & Assoc) for the petitioner.
David Ong (Ong & Assoc) for the respondent.

Amarjeet Singh JC:

[1] The petitioner, the husband of the respondent, petitioned for divorce of a marriage of 11 years and the custody of the two children of the marriage ('A' and 'B'). A is a girl aged 11 years and B is a boy aged 4 years. The parties have been staying apart since 2017. The parties accept that the marriage has irretrievably broken down. They lay blame on each other for the break down. Both state that the behaviour of each other is such that the petitioner or the respondent cannot reasonably be expected to stay with the other. Apart from the above the respondent's principal reason is on the ground of adultery on part of the petitioner.

FINDING ON BREAK DOWN OF MARRIAGE

[2] After a careful examination of the evidence and having heard and seen the demeanour of both parties I arrive at the conclusion that the marriage has

irretrievably broken down. I find that it was the respondent's behaviour that is almost wholly responsible for the break-down of the marriage. I find that the behaviour was such that the petitioner cannot be reasonably expected to stay with the respondent. The respondent had no qualm of creating a scene and embarrassing people. She turned up at his former place of work accusing him and one of his colleague of having an affair. The respondent did this a few times until his employer had to ask the petitioner to leave his job. As a result, the petitioner was unemployed for a few months. The petitioner denied having the affair. The allegation of adultery has also not been proved. It is merely a bare allegation made by the respondent. The party alleged to having an affair with the petitioner has since sued the respondent for defamation.

[3] The evidence shows that the respondent is a highly strung person with a short temper that has erupted in bouts of violence which has been directed to the children especially, to towards A, and the petitioner. She is also unable to control her emotions and actions especially when she comes home drunk from work and is unable to take the noise of the children playing. She always complains that the children give her headaches. It is during this time that her anger is channelled to the children and the petitioner and wants them out of the house. The respondent has also asked the petitioner to take the children to his mother's house as she wants to go to work. The undisputed evidence shows that the respondent in one of her drunken episodes threatened to kill herself. She threatened to jump of the building in which her father's house situates. She has taken to caning and beating the children. The evidence shows that her beatings have left marks on her daughter until the school authorities had to call the petitioner and raise the issue with him. The respondent denies that her daughter is suffering psychiatric trauma and denies knowing that her daughter is being treated for the same at the Penang General Hospital. After having considered the evidence as a whole I am satisfied that the respondent is the cause of her daughter's psychiatric condition.

[4] The petitioner has done all he could to keep the marriage together. He even moved out of the matrimonial home which is his mother's house and moved into his father-in-law's house. He stayed in his father-in-law's house for seven years until 2017 when it became intolerable to live with the respondent and moved back to his mother's house with the children. The petitioner was not happy with the respondent's job at karaoke places and bars which keeps her away from 8pm–4am and from which she frequently comes home drunk. The petitioner was not happy with this situation but the respondent couldn't care less for the petitioner's feelings on the matter. My distinct impression of the respondent is that she is a strong willed person used to having her way and would easily lose her temper with anyone who crossed her.

[5] I am satisfied that the incessant quarrels that the parties had were due to the respondent's attitude and behaviour which was usually violent. The petitioner is unable to accept the beatings the children receive at the hands of the respondent, the job that the respondent keeps and the drunken state of the respondent. The marriage is certainly beyond saving and I hereby make an order dissolving the same.

CUSTODY OF THE CHILDREN

[6] A is presently schooling and B is in pre-school. Both children are residing with the petitioner at his mother's home since 2017. They are being taken care of the petitioner, his parents aged 68 years and 62 years and his three sisters aged 42 years, 40 years and 38 years respectively. The respondent continued to stay at the father's house and recently taken up an apartment and is living alone. She continues to work nights till the early hours of the morning. The respondent says that she wants custody of both the children or alternatively custody of B.

[7] In considering the question of custody of the children, I had in mind the following principles and provisions of law concerning welfare of the children and wishes of the parents:

(a) sub-s (2) of s 88 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') provides that the welfare of the child is the paramount consideration. The welfare of the children prevails over the wishes of the parents unless it can be shown that the wishes are in line with the welfare of the children. It is trite that parental rights are overridden if they conflict with the welfare of the children (see *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585; [2016] 2 CLJ 505 and *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234; [1977] 1 LNS 138);

(b) the court has to take into account all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other relevant circumstances and weigh them to determine the course to be followed is that which is most in the interest of the child's welfare (see the passage in *J v C* [1970] AC 668 at p 710 which was accepted in *Re KO (an infant)* [1990] 1 MLJ 494 by Edgar Joseph Jr J); and

(c) the welfare of the child takes precedence over the claims of the unimpeachable parent and the justice of the case as between the parents (see *Re K (minors)* [1977] Fam 179).

[8] I had also considered the question of the wishes of the children. The wishes of the children are usually determined by interviewing the children. sub-s (2) of s 88 of the LRA provides a limitation in that the child is of an age

to express an independent opinion. In this case, I have found that the respondent is the cause of the A's psychiatric condition and it is not safe for the child to be in the respondent's custody. Thus an interview with A is not necessary in the circumstances. In *Teh Eng Kim* the Federal Court accepted that a child aged five was not expected to have an independent opinion on such a matter. I hold that B is not of an age to express an independent opinion on what his wishes are.

[9] I also considered the rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

[10] Finally, where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently (see sub-s (4) of s 88 of the LRA).

[11] With the above matters as the backdrop, it is my considered view having taken into account the prevailing circumstances of this case that the children should be placed under the custody, care and control of the petitioner. The evidence reveals that the respondent is a person who has pursued her own interest and career to the detriment of her children and it does not appear that she would change to accommodate the growing needs of her children. She still chooses to work at the places that have many vices, one of which is drinking. She keeps very late hours and is not be around or too exhausted to look after the children. The children are growing children and need a stable, warm and comfortable environment which is presently being provided by the petitioner. The respondent is a violent person with a temper and emotions that are not conducive for the well-being and welfare of the children. A is absolutely terrified of the respondent. She has received severe beatings at the hand of the respondent which has left marks on her body. At her father's house there were occasions where the respondent had locked A out of the bedroom and refused her meals. The violent behaviour towards A has caused the child to suffer mentally and resulted in her receiving treatment from the Penang General Hospital. A becomes very nervous and apprehensive during the respondent's access visits.

[12] With the petitioner, both the growing children have the warmth, stability and security of a family life in a stress-free environment where they are allowed to interact with others, their relatives, who are at hand to attend to their needs and provide strong family support. I find that the children are now in a stable environment of family life and school. It would be very disruptive to

separate the children from one another as well as the family environment that they are in now. It would be against the welfare of both or one the children to be in the custody of the respondent. In addition, the father had always taken care of the children financially although earning a meagre salary of RM3,000 a month. The respondent on the other hand has not done so when she began working again. In my view giving custody of the children or even B to the respondent, given that she still keeps late hours at an establishment where alcohol is available, would be very risky and an irresponsible act given her behaviour and temper.

[13] I have considered all the relevant facts, the relationships, risks, choices and wishes of the parents. I am of the considered view that the proper order to make in the circumstances is to grant custody to the petitioner with access to the respondent on weekends to B only. Access to A is granted only if A consents to seeing the respondents.

THE DIVISION OF MATRIMONIAL PROPERTY

[14] The respondent is seeking an order for the sale of the matrimonial properties and the proceeds to be divided equally between the parties. In her submission the respondent has identified that the property purchased on 20 June 2016 during the marriage and which is under construction to be sold and the proceeds divided under s 76 of the LRA 1976. The respondent claims to have contributed towards the deposit and/or purchase price of the said property which is purchased on loan taken from a financial institution.

[15] In addition the respondent identified the petitioner's mother's house, No 9–11–10 Lintang Macallum Dua, Georgetown in which the petitioner and the children of the marriage live as the matrimonial home and says that she has contributed towards the payment of maintenance fees, payment of electricity and water bills and other utilities from time to time. She also asks that this property be sold and the proceeds divided under s 76.

[16] It is clear that a matrimonial home may not necessarily be a matrimonial property or asset which the court has the power to order division of under sub-s (1) of s 76 of the LRA in that a place where the parties cohabitated after the marriage may not be in their names, either solely or jointly but could be one which belongs to either of their respective families or even rented. The party seeking division of property under s 76 of the LRA must come within the ambit of one of its provisions to trigger the application of the section.

[17] The Court of Appeal in *Yap Yen Piow v Hee Wee Eng* [2017] 1 MLJ 17; [2016] 1 LNS 1060 has explained the division of property acquired during the subsistence of marriage under s 76 of the LRA through the classification of

matrimonial and non-matrimonial property. Matrimonial property relates to property acquired by joint efforts of the spouse while non-matrimonial property relates to property acquired through the sole effort of one spouse or property acquired before the marriage. The court explained the position as follows:

(a) any assets acquired by joint efforts which we have classified as matrimonial property. In this category, the court has an obligation to divide the assets (see sub-s (1) of s 76 of the LRA);

(b) any assets acquired by one party by sole effort which we classify as non-matrimonial property. In this category, the court is not obliged to divide but may do so (sub-s (3) of s 76 of the LRA); and

(c) assets which were acquired before the marriage, but has been substantially improved by the other party or by their joint efforts. In this category, if there is no substantial improvement, the property is not subjected to division at all. In addition, if the property has been acquired before the marriage and subjected to a loan, the said property may not fall in that category (see sub-s (5) of s 76 of the LRA).

[18] In the light of the principles established in *Yap Yen Piow* it is clear that the property acquired in 2016 could fall within the ambit of sub-s (1) of s 76 of the LRA if the allegations therein are proven by the respondent. However, there is no evidence that the respondent has contributed towards the deposit and/or purchase price of the said property where 90 percent is made up of a loan taken. There is no evidence as to who has taken the loan and the repayment of the loan. The respondent could not even identify the property and where it is situated.

[19] On the other hand, on the principles established in *Yap Yen Piow* it is clear that the property No 9–11–10 of Lintang Macallum Dua is acquired before marriage and no substantial improvement was done on the property by the respondent. In my view payment of maintenance fees, electricity and water bills and other utilities does not fall within the ambit of 'substantial improvement'. The property is therefore not subject to division at all.

[20] In the circumstances I do not make any order in respect of these properties.

MAINTENANCE

[21] The respondent has chosen not to file any reply or pleadings in this petition. I agree with counsel that the respondent has taken a somewhat lackadaisical attitude to this case and has not shown any seriousness in pursuing this case. The demands for maintenance are an afterthought. She has not

produced any evidence to show the earnings of the petitioner but makes a demand that the petitioner pays a lump sum of RM30,000 as a clean break. I believe the evidence of the plaintiff that he is working as a cook in a food court earning approximately RM3,000 a month. He is providing the maintenance and financial needs of the both children. The income is just sufficient for his and the needs of his children. In her submissions the plaintiff says that she left the matrimonial home on account of the petitioner's affair with another woman, an allegation that merely remains an allegation, as it is not proven. The respondent has an income of her own on which she could live on.

[22] The petitioner has agreed to pay the respondent a sum of RM30,000, interest free, as a lump sum payment. He has asked that the payment be made by way of instalments. Considering his financial affairs, I find the offer very fair and reasonable.

CONCLUSION

[23] In view of the above, I make the following orders:

(a) the marriage of the petitioner and respondent is dissolved;

(b) the petitioner is granted custody, care and control of A and B, the two children of the marriage;

(c) access is granted to the respondent on weekends to B only. Access to A is granted only if A consents to seeing the respondent;

(d) the petitioner pays the respondent RM30,000, interest free, by way of instalments of RM500 a month until full realisation; and

(e) there is no order as to costs.

Petition allowed.

Reported by Addibah Adnan